Broadway Catering Corp. d/b/a Studio 54 *and* Theatrical Protective Union Local No. 1, International Alliance of Theatrical Stage Employees, AFL-CIO, CLC *and* Jess Herman. Cases 2-CA-16027 and 2-CA-16064

March 24, 1982

DECISION AND ORDER

MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On October 23, 1980, Administrative Law Judge Thomas A. Ricci issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, the General Counsel filed exceptions and a supporting brief which was adopted by the Charging Party Union, and Respondent filed a brief in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge, as modified herein, and to adopt his recommended Order.

We agree with the Administrative Law Judge's finding that a stagehand unit is inappropriate for collective bargaining and that therefore a bargaining order is not warranted.[2] Specifically, we find that the disc jockeys, house board light operators, disco light board operators, flymen, and preset men, urged by the General Counsel as a separate appropriate unit, do not possess a community of interest so separate and distinct from Respondent's other employees as to warrant separate representation.

The evidence shows that the stagehands are not required to possess any unique skills or experience in order to perform their jobs. The only "skills" that appear necessary to perform the jobs of disc jockey, light board operator, or flyman are a sense of rhythm and an ability to work in conjunction with other employees. Counsel for the General Counsel's own witnesses testified, in substance, that with a general working knowledge of the system and between 10 to 30 minutes of training, they were able to perform their jobs.

As to supervision, the General Counsel contends that the stagehands are separately supervised by Paul Matheson and the witnesses generally agreed that Matheson is the stage manager in charge of the "technical aspects" of the stagehands' work. However, the evidence shows that most personnel matters, such as hiring, firing, changing schedules, and discipline, are handled by or, at the very least, discussed with either General Manager Overington or one of Respondent's two owners before any final decision is made. It is uncontroverted that these individuals supervise all non-stagehand employees. Thus, even assuming without deciding that Matheson is a supervisor under the Act, many aspects of the stagehands' terms and conditions of employment are subject to supervision in common with Respondent's other employees.

In addition, we find that Respondent's operations are functionally integrated to a degree that precludes separate representation of stagehands. Contrary to the General Counsel, the evidence shows that there is some interchange of job functions. Non-stagehands occasionally clean the "stage" area and also occasionally perform stagehand work. At least two stagehands, Acker and Craddock, occasionally work on non-stage electrical equipment and perform general maintenance throughout the facility. In addition, during renovations, which occur approximately every 9 months, all employees work together with minimal differentiation based on job classifications. The evidence also establishes that the "show" here is more than merely that produced by the work of stagehands. Respondent strives to create an ambiance through music, lights, props, scenery, and also through the participation of many employees in an evening's festivities. Non-stagehands and stagehands alike often mingle and/or dance with patrons. The clothing and overall appearance of all employees help to create the festive atmosphere Respondent desires. In short, an evening's "production" is a combination of music, lights, props, and interaction and contact among all employees and between employees and patrons. It is this unique nature of Respondent's business that sets it apart from a traditional stage show and in part distinguishes this case from those in which the Board has found a stagehand unit appropriate.[3]

[1] Respondent and the General Counsel have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[2] In light of our unit finding, we find it unnecessary to decide whether the Union had attained majority status when it demanded recognition and bargaining. We also find it unnecessary to rely on the Administrative Law Judge's discussion of the legal effects resulting from the absence of Respondent's records from the evidence. Our unit finding is based on the testimony of the General Counsel's witnesses and on the testimony of Respondent's witnesses on matters not covered by the General Counsel's subpenas.

[3] See, e.g., *Six Flags Over Georgia, Inc.*, 215 NLRB 809 (1974).

Thus, for all of the above reasons, we find that Respondent's "stagehands" do not constitute a separate appropriate unit and that therefore a bargaining order is not warranted.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Broadway Catering Corp. d/b/a Studio 54, New York City, New York, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order.

DECISION

STATEMENT OF THE CASE

THOMAS A. RICCI, Administrative Law Judge: A hearing in this proceeding was held at New York City, New York, on various dates beginning on September 24, 1979, and ending on June 2, 1980, on complaint of the General Counsel against Broadway Catering Corp. d/b/a Studio 54, here called the Respondent. The complaint issued on December 29, 1978, based on separate charges filed on November 13 and December 1, 1978, by Theatrical Protective Union Local No. 1, International Alliance of Theatrical Stage Employees, AFL-CIO, CLC, here called the Union, and by Jess Herman, an individual. The issues of the case are whether the Respondent discharged four employees in violation of Section 8(a)(3) of the Act, and whether it unlawfully refused to bargain with the Union in violation of Section 8(a)(5). Briefs were filed by the General Counsel and the Respondent.

Upon the entire record, and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

Broadway Catering Corp. is a New York corporation which in New York City operates a public dance hall. Its annual gross revenues are in excess of $500,000. It also annually purchases goods and materials valued in excess of $5,000 either transported and delivered to it directly from out-of-state sources or received from within state sources which in turn receive the goods from out of State. I find that the Respondent is engaged in commerce within the meaning of the Act.

II. THE LABOR ORGANIZATION INVOLVED

I find that Theatrical Protective Union Local No. 1, International Alliance of Theatrical Stage Employees, AFL-CIO, CLC, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *A Picture of the Case*

This case is divisible into three parts: (1) Did the two owners of the Company, in charge and operating it on a daily basis, violate Section 8(a)(1) of the Act by a number of coercive statements—interrogations, threats of discharge, threats of physical violence, promises of financial benefits to induce abandonment of union activities, etc., when the employees started an organizational campaign early in November 1978? (2) Did the Respondent discharge four employees then because of their union activities, and thereby violate Section 8(a)(3)? As to these two questions, the evidence—consisting almost entirely of oral testimony—is clear enough to make possible definitive resolution. (3) Did the Union represent a majority of the employees in an appropriate bargaining unit so that it can be said the Respondent violated Section 8(a)(5) by refusing to bargain with it? As to this question, it is twofold: First there is the matter of whether, as the General Counsel contends, a unit limited to only a portion of the employees at work in this place is appropriate, or whether, as the Respondent would have it, all of them must be joined in a single unit. The second is whether, if the limited unit can be deemed appropriate under Board law, just which employees were in that unit at the critical time of demand and refusal and did a majority of them timely authorize the Union to represent them?

The Respondent denies commission of any unfair labor practices.

B. *The Locale*

The Company runs a public dance hall in an old theatre building converted into a broad flat floor space. A thousand, and sometimes as many as 1,800 persons in a single night, pay to come to dance. There is a large bar, with bartenders serving drinks, both at the bar and by bringing them to customers on sofa couches here and there where the dancers sit and rest. The music is supplied by someone continuously playing phonograph records. There are lights in the place, hundreds of them, floating on and off, in all colors. Some are in the ceiling, some in the sidewalls, some reflect from glass and mirrors that decorate the place. Attached to the ceiling are a number of metal strips from which decorative boards, or "scenes," are hung, sometimes lowered almost to the floor. These pictures, or background decorations, as some of the witnesses called them, are controlled from the side of the room by rope pulleys. An employee, called a fly rail man, causes them to move up and out over the heads of the dancers, and then lowers or raises them by pulling a rope with a balanced weight at his end. The pictures are changed from evening to evening, and sometimes even during a single all night session, from midnight to dawn.

Near the phonograph, off on one side of the large room, there are light boards; these have buttons and switches which control the many lights everywhere. There is an employee always in attendance at each board while the dancing is going on. There are other employ-

ees also: Busboys who circle the room carrying glasses and cleaning the place; ticket sellers near the entrances; a hostess, security guards, and even a dishwasher, somebody said.

C. *Necessary Preliminary Comments on the Nature of the Evidence*

Certain unusual circumstances prevailing at this hearing, and the way the case was tried by both the General Counsel and the Respondent, make it necessary to comment at the outset upon the nature of the proof offered by both sides.

First: The basic theory of illegality underlying the 8(a)(5) part of the case is that this dance hall is to be deemed the same thing as a theatre. In a theatre the Board has long held that a unit of stagehands is appropriate for bargaining purposes, albeit it does not include all the employees of the theatre. *Six Flags Over Georgia, Inc.*, 215 NLRB 809 (1974). The General Counsel therefore asks that the man who plays the phonograph records, the man who switches the lights on and off, plus the man, or two, who "fly" the many decorative pictures over the heads of the dancers, may bargain collectively with the Company, and never mind whether the other employees who circulate all over the hall care to join in or not. With this, the major issue seems to be establishment, by Board fiat for the first time, of a parallel between a dance hall and a theatre, and therefore the employees who testified for the General Counsel paraphrased everything they talked about in theatrical terms. The man who works the phonograph is called a "disc jockey"; the man who fixes the lights and switches is called a "preset man"; the man who pulls the ropes to raise and lower pictures over the heads of the dancers is called a "fly man"; the men who turn the lights on and off are called "light board operators" or "disco board operators." And again and again the witnesses spoke of their theatrical education, their prior theatre experiences, and even about their aspirations to become Broadway or Metropolitan Opera stagehands. They even referred to the entire dance hall as "the stage," with the 1,000 customers as "the actors." But descriptive words will not change realities. The end result was a confusion of conclusionary generalities covering hundreds of pages of testimony.

Second: Throughout the hearing, six full days over a 3-1/2-month period, the two owners of the Company—Ian Schrager and Stephen Rubell—the principal defense witnesses, were brought to the courtroom from a Federal prison by United States Marshalls who continuously sat in attendance. They were serving an extended sentence for income tax fraud. A result was an understandable tension among the other participants, including the lawyers on both sides. With this, much of the questioning of witnesses, both on direct examination and cross-examination, was argumentative, general, conclusionary, and unclear. Of course the witnesses, each side having an ax to grind, continued the pattern, and spoke as much in heated and conclusionary terms as they did factually. In sum, there is a resultant ambiguity with respect to some of the essential facts which must underlie any unfair labor practice finding.

Third: In the face of a valid *subpoena duces tecum*—denial of a motion to quash having been sustained on appeal to the Board—the Respondent refused to produce its records; covered by the proper subpena were all employment records covering the critical period in question. Both the owners—Schrager and Rubell—also refused to honor valid *subpoena ad testificandum* at the start of the hearing when called as witnesses by the General Counsel. Later, when the General Counsel had put in most of his case-in-chief, they changed their minds, but by that time their credibility had already become somewhat impaired.

Why the General Counsel chose not to seek enforcement of subpenas in the district court to compel production of the employment records, I do not know. But absent those records—which presumably would have shown directly who worked when—all the record contains is the vague and very ambivalent recollections of witnesses who only worked part of the time while the dance hall was in operation, and who testified as much as a year and a half after leaving the place.

And finally, for most of the employees who worked in this place, employment was on an irregular basis. There are no fixed, continuing, regular schedules comparable to the usual commercial employment. Some people work a day now and a day then; some come for a few days and then leave to return at their convenience. Often the employees decided among themselves who would work certain days of the week and who would just sit by and wait. Many are students elsewhere. Some even work at other places, apparently their other employment also characterized by complete irregularity. Further, some are paid hourly while others receive a fixed amount for a day's work regardless of how many hours they put in. In the face of all this, company representatives said all the employees punch timecards. But they were not brought to the hearing, with the result that it is impossible, despite the unending talk, to really know who worked when.

Despite these continuing vagaries throughout the record, people did work, were paid, and were employees, whatever their status at any given time might have been. And, more important, four of them were fired, for the Respondent admitted as much when, in defense, it stated its affirmative basis of discharge for just cause.

D. *Violations of Section 8(a)(1)*

Union activities among the employees started on November 3, 1978, when six of them met at the restaurant with two union agents. All six signed union authorization cards that day. Mitchell Acker, the principal activist who started things, testified that, for a consecutive number of days starting on November 4, Schrager, the owner, interrogated him about the union activities. Schrager asked him: "Have you spoken to anybody about the Union." Acker said "No," and spoke about union activities going on in another dance hall called Zenon, where he also worked at that time. Later the same evening, Schrager told Acker "there was room for me to make lots of money . . . I'm raising a family. He did give me job security . . . He'll double my salary."

Later that same evening Schrager found occasion to tell Acker "he heard terrible things about me," and that he should come back to see him again. Acker returned later the same night, and talked to Rubell, who asked him: "Are you trying to bring the union in here?" and "if we had signed anything." Again, Acker said no.

On Tuesday, Paton, an employee who used to prepare a schedule of assignments later to be approved by Schrager, called Acker at home to tell him he "would not be working until future notice unless I spoke with Mr. Schrager." So Acker came to Schrager's office and the manager told him: "You have a really big mouth . . . I heard you were talking about the union . . . . He asked me if I would join the union." When Acker did not answer, Schrager "kept persisting about my joining the union . . . 'I could understand you wanting to join the union, but it cannot be under this roof.' . . . if I wanted to join the union, then we will shake hands, and we will be friends now, but that I could not work for him anymore." When Acker asked, "Does that mean I'm fired," the boss answered, "Well, kind of." Schrager also said to the man that day, according to Acker's testimony, "If you're betraying me, we'll be enemies . . . And if you're not dead, you're going to be in a lot of trouble."

On November 8, as Acker continued to testify, he saw a letter with the Union's name on the mast head, delivered to the secretary's office. A few minutes later Schrager called him to the office and said, "The last time you told me that you didn't sign anything. You said that you had nothing to do with the Union. How come now you say differently?" When Acker answered, "After the threats, I changed my mind," the manager continued: "Who else signed the cards." Acker then told him and listed the five following names—Jess Herman, Toby Scott, Reginald Craddock, Billy Paton, and Nicole LeBrun.

Again the next day, November 9, while he sat at a table in the dance hall, Rubell said to Acker: ". . . if I would renounce the union, that he would double my salary. That he would give me a raise. And that no matter what it cost, even if it cost a half a million dollars, he will not have the union in here. He said the union will not win." When Acker again asked, "Does that mean I'm fired," Rubell answered, "Well, maybe not today or tomorrow."

Reginald Craddock, another employee who also signed a union card on November 3, testified that on November 11 Rubell "Just said that he didn't like me anymore because I signed a union card." When Craddock asked "what union card?" Rubell said, "I know you signed one. I trusted you and I don't know why you did this. You are foolish." Again 3 days later, Rubell ". . . asked me again why I signed the union card and that I was foolish. . . . That he was going to have me work extra days. I was going to be paid more money. He didn't expect me to sign the union card." "I think he did mention that now since I signed the card I probably wouldn't work any extra days." On the 15th, again, still according to Craddock, Rubell told him he "Didn't understand why I lied about signing the card and why I signed it. Again he was going to have me work more days. Since I signed the card he would think about it."

Craddock continued to testify that on the 19th, as he was changing the lights in the place, Schrager said to him, ". . . he didn't want that color in the light. Just like he wants the union out." Later that night Schrager also told Craddock: "He didn't know why I signed the union card. He was going to have me work more days. If I wanted to work to make extra money that he would let me work extra time. He also mentioned if the union lost would I quit and I told him no. And if the union lost would I fight to get it back in? I said no."

Another employee who signed a union card was William Paton. He also said Schrager questioned him a number of times about the union activity. Both on November 4 and on November 5 Schrager called him to the office to ask what he knew about the Union. Each time Paton spoke only of what was going on at the Zenon Dance Hall. On the 6th, Paton was showing his tentative work schedule to Schrager, when others were also present. When Schrager again asked what he knew of the Union, Paton started to discuss the schedule, but the boss said: ". . . that he had to think about it. . . . He didn't like the idea that the union might come in. He said some of the nonunion companies already working at Studio 54 would not be able to work there. . . . That I was to put together a schedule and get it back to Ian in a day or two." This talk ended with Schrager telling Paton to put together the schedule and give it to him in a day or two. There was more questioning of like kind in the following days by Schrager of this employee, but there is no point in detailing it repeatedly.

What is important is that on November 8, as Paton said, he started to explain in the office why in his opinion a union might be a worthwhile thing. It was at this point that Schrager told Paton to remove Acker, Scott, and LeBrun from the schedule and to advise them of the fact right away. Paton did that. Before leaving the office Paton asked Schrager, "What's this with these threats against Nicky [LeBrun] and Mitch [Acker]." Schrager's answer was that "it was ridiculous. He didn't mean those things."

Testifying in defense, Schrager and Rubell denied, in meticulous detail, almost every one of the above-listed interrogations, threats, bribery promises to induce abandonment of any union idea, etc. I credit the employee witnesses, and reject the sworn testimony of the two owners wherever they are contradicted on this record.

Both Schrager and Rubell admitted they were opposed to having a union represent their employees, and that they told the employees this was their determination. Schrager said he did not remember saying he would "have nothing to do with the union under the roof of Studio 54," but that he "might have" asked had anyone signed a union card. He said "maybe" he did tell Craddock he wanted the color of the lights out just as he wanted the Union out; "maybe" he asked "if the Union lost would he [Craddock] fight to get the Union back in." Asked had he inquired of Paton what he knew about the Union, Schrager answered: "I don't remember. I was trying to find out at this point what union was involved, if any. Which union was trying to come in." He also could not recall had he questioned Jess Herman about all

this. Rubell too said he only questioned employees about their union activities to learn which union was involved.

A no less relevant factor on this question of credibility is the fact that both Schrager and Rubell stand convicted felons guilty of a serious crime involving direct moral turpitude. Dishonesty in so serious a matter bespeaks dishonesty in others.

I find that by Schrager's conduct in interrogating Acker and Paton about their union activities, in questioning Acker about the union activities of other employees, in promising Acker a higher rate of pay as inducement for discontinuing union activities, in threatening to discharge Acker if he persisted in his union activities, in threatening Acker with personal physical violence because of his union activities, and in telling Craddock he would be denied additional work if he continued his union activities, the Respondent violated Section 8(a)(1) of the Act.

I also find that by Rubell's conduct in offering a higher salary to Acker to induce him to abandon his union activities, in telling Acker he would be discharged if he continued his union activities, in questioning Craddock as to whether he had signed a union card, and in telling Craddock that he, the owner, knew the employee had signed a union card, the Respondent violated Section 8(a)(1) of the Act.

E. *Violations of Section 8(a)(3)*

1. Nicole LeBrun

LeBrun worked on one of the lighting boards during the dance periods, changing lights on and off here and there. She started in September. She was also one of those who signed union cards, and had worked 5 days a week for some time. Her testimony is that on Sunday, November 5, Paton called her to say she was not to work that Sunday and that she should talk to Schrager because there was "rescheduling going on." She came to the office the next day where Schrager asked what she knew about the Union. When she said she did not know much, he told her it was a "father and son" affair and that she might therefore lose her job for being a woman. Schrager then went on that "they had fought unions before and he would not let the union come in . . . He told me if I was loyal to Studio 54 I could make more money. He said he knew I was not happy with the amount of money I made but if I was loyal to the Studio that I could make more money." Schrager then asked what her schedule was, and when she told him he said she "could go back to work on that same schedule." As she was leaving, still according to LeBrun, the owner said, "If I was lying to him he would kill me."

LeBrun worked as usual the next week but when she reported per schedule the following Sunday, November 12, she was told someone new was taking her place. Schrager told her that night that "schedules were being changed and they were trying out new people and they would keep in touch with me." LeBrun had always worked in accordance with a prearranged schedule, and had never had to call in to learn whether she was to come to work or not. After the 12th, she called in a number of times, always when she thought she was scheduled, but was always told there was no work for her. She worked on only 4 days between November 11 and 20, only after calling in to ask. She was never called again.

For reasons already stated, I do not credit Schrager's denial, either that he threatened this woman with physical violence or with discrimination in employment because of her union activities. I find that by his questioning of her as to her knowledge of union activities, by his promise of more money if she refrained from union activity, and by his threat of physical violence, the Respondent violated Section 8(a)(1) of the Act.

I also find entirely unpersuasive Schrager's assertion, at the hearing, that the reason why he "discharged LeBrun" was because her maintenance work, i.e., adjusting the light board or timely reporting necessary corrections to be made on it, was "inadequate." He said he could not recall having brought these now asserted failings to her attention at any time. I find, all things considered, that the Respondent discharged LeBrun as a move to curb the union activities then going on, and thereby violated Section 8(a)(3) of the Act.

2. Jess Herman

Herman worked in this place from August to November 27, 1978. He talked at length about the kind of work he did. During September, while the hall was closed for a week or so for "refurbishing," as the witnesses said, he "installed lighting effects, worked on the rigging, things of that nature." After that he was offered a job as "preset" man. Asked what that meant, Herman said it was "Basically . . . various jobs such as filling air compressor cannons, maintaining the mylar drop . . . whatever maintenance had to be done. . . ." He worked about 5 days a week.

Herman also signed a union card on November 3. On November 14 and 15, Schrager called him to the office to ask "what was going on with the union thing and how did I fit into it." Herman asked the owner to explain what he meant, and Schrager continued "he was going to do whatever he could to keep the union from coming in." The conversation closed with the employee explaining "the other side of the situation."

At the close of his shift on November 27, Michael Overington, the supervisor, told Herman he was being discharged because of a "cut back on the overhead." When Herman asked who had decided this, Overington said it was Schrager.

Testifying in defense, all Schrager said about this man is that he could not recall having spoken to him, that he did discharge a man because "there was no need for that person's service," and that it was "either Richard Toby or Jess Herman."

I credit Herman, and find that by the owner's questioning of the employee about his union activities, and by his telling him he would do whatever he could to prevent unionization among the employees, the Respondent again violated Section 8(a)(1) of the Act. Schrager's general, unsupported statement that Herman was "not needed" is unconvincing on this total record. I therefore also find the Respondent in fact discharged Herman in

retaliation for his prounion attitude, and thereby violated Section 8(a)(3).

3. Acker and Scott

The evidence proving discrimination—denial of further employment—against these two men perfectly illustrates the insurmountable problem which the record as a whole presents with respect to the two major issues to be decided below: Whether the limited bargaining unit was appropriate, and just how many employees were at work in the unit at the significant moment. Unlike the usual situation in a factory, or a department store, employment here is not on a regular, predictable, fixed basis. A more fitting phrase in this case is that most of the people worked "on call," with schedules always tentative, employees coming and going, continuing changes always caused by their outside interests, activities, and even contemporaneous employment elsewhere. The picture is further complicated by the fact that the dance hall is open to the public on a regular basis only five or six nights a week. One night each week—almost every week—there is also what the witnesses spoke of as "a party"; i.e., the whole place is used by some fashion organization, or perhaps a private wedding group, when many of the employees are sometimes paid by outsiders and not by the Respondent at all. Although it does appear that the Company's employees all punched timecards every time they worked for the Company itself, there are no records of any kind in evidence. The general recollection of the employee witnesses as to when they worked varies all over the record. Almost 2 years after the events, they could hardly remember with any precision.

This important reality as to the state of the record shows in the testimony of these very two witnesses who were illegally discharged. Acker said he last worked on November 9; absent the company records, which the Respondent refused to produce, of course I believe him. He also said he worked during the day on November 7. Did he come because he was scheduled? "I don't want to say if that's the reason I came there . . . . It's just a place where I work regularly. I was friends with the people that I worked with there." But Acker also said that the week before he had worked five nights for the dance hall called Zenon. His explanation for this is that the Zenon owner had offered him a job and he had accepted. Next came this: ". . . I was hired and discharged—I quit."

Scott started by saying he was an employee from November 2 to November 8. Later he explained he only worked 3 days—Friday, Monday, and Wednesday. "I wasn't sure I was going to get paid." Whatever uncertainty this sort of testimony raises as to the status of this employee at any given moment, it is a fact on this record that he was an employee of the Respondent. He testified, and no one contradicted him, that Overington, the supervisor, had him sign a W-2 form at the end of one of the night shifts.

Scott testified that during the night of November 8, Rubell asked him had he "signed with the union," and he said yes. When Rubell then asked him why he had signed and Scott did not answer, Rubell said, "it was silly and he would take care of me . . . this is going to cost me a lot of money." At this point, still according to Scott, Schrager cut in on the headset communication to say "don't listen to Rubell," but Rubell went right on with ". . . its silly. Its just going to lose your job."

Neither Acker nor Scott was ever recalled to work after November 9. The established system being loose and often changing as to who would work next, the realities are that the Respondent got rid of these two simply by never calling them back to work. Scott returned on November 13 and again on November 19 to ask the supervisor when he was supposed to report, only to be told "the schedule was up in the air," and that he would be called. But he never was.

In any event, whatever the Respondent's method was to get rid of employees it no longer wanted, I find it did discharge both Acker and Scott. The proof is direct as to Acker, for when his lawyer asked him to explain "the facts and circumstances surrounding that discharge," Schrager gave two reasons. One was that Acker was "getting intoxicated." Without explaining details, Schrager added he had heard about this weakness a few weeks, a month, "maybe a little bit more," before the discharge. Other than saying he had once spoken to Acker about this "[i]n the fall of 1978," the witness could not remember anything else. His second stated reason for discharge is more revealing, and it is that he had heard Acker was also working at Zenon and engaged in union activities there. "And I didn't know that any of the people were working over at—from our place were also working over at Zenon, which is another reason why Mitchell Acker was fired . . . . That's another one of the reasons why Mitchell Acker got fired when I found that out." When to this is added the many violations of Section 8(a)(1) committed by Schrager—some of them threats of discrimination voiced directly to Acker—the conclusion that he fired the man because of his union activities is inescapable. I therefore find the Respondent violated Section 8(a)(3) by discharging Acker in November 1978.

As to Scott, the testimony by Paton that on November 8 Schrager told him to remove Scott from the schedule stands uncontradicted. Schrager as a witness did not address himself very precisely to this discharge allegation. His general testimony at the hearing that there was a restructuring of the business going on, that the refurbishing meant less staffing was required, and that ". . . in November . . . we had started to discharge some employees and started to add others," leaves much to be desired. Such conclusionary statements, unsupported by any objective justification, are very unconvincing. I do not credit Rubell's general denial of having voiced any threat to Scott; his position at the hearing was essentially that he did not even recall who Scott was.

I find that Rubell did ask Scott whether he had signed up with the Union, and that he did tell the man his union activity would cause him to "lose your job." By each of these statements voiced by the owner, the Respondent violated Section 8(a)(1) of the Act. And I also conclude, on the basis of the entire record, that Scott was in fact discharged in violation of Section 8(a)(3).

F. *Section 8(a)(5)*

I do not think this record can support a finding, as alleged in the complaint, that a unit limited to only some of the employees of this employer constitute an appropriate bargaining unit. The testimony is too confused to make possible positive identification of some jobs as against others. Unit descriptions, necessary for any unit finding by the Board, list jobs, not persons by individual names. The impossible ambiguity running throughout the oral testimony starts right there. Ordinarily, the work a man does is definable, distinctive, different from that of employees in other categories. Here, the witnesses used colorful adjectives of all kinds and ever changing, when speaking of this man or that.

This question of just what work so and so did at varying times during his employment is inextricably entwined with the collateral question of majority status that always goes hand in hand with the appropriate unit issue in all 8(a)(5) proceedings. With the work that individuals did from week to week, and even from day to day, ever changing, it is equally impossible to pinpoint—on the record as here made at least—just who was doing the work alleged to be distinctive during the critical days when the Company ignored the Union's bargaining demand. In fact, it cannot even be said who was on the current payroll at the time in any category—in or out of the alleged appropriate unit. In sum, I shall recommend dismissal of the refusal-to-bargain aspect of the complaint because the evidence does not suffice to prove either the appropriateness of a limited unit, or majority status within a limited unit.

I am not unaware that some of these essential questions—how many people were doing what and when—might possibly have been clarified had the employer's records become part of the evidence. Unquestionably, the Respondent stands to gain by the absence of these records, which it refused to produce. Cf. *International Union, United Automobile Workers [Gyrodyne Company of America]* v. *N.L.R.B.*, 459 F.2d 1329 (D.C. Cir. 1972). But however that deliberate strategy may destroy the credibility of the company witnesses when they spoke of these matters, it cannot be substituted for that affirmative proof, always a burden upon the General Counsel, to establish the facts necessary for any unfair labor practice finding. A respondent appears in court against its wishes; it bears no burden to prove anything, except it be to rebut a *prima facie* case already made out by the prosecution. It has long been the rule that unfair labor practice findings must be "supported by substantial evidence on the record considered as a whole." *N.L.R.B.* v. *Glen Raven Silk Mills, Inc.*, 203 F.2d 946 (4th Cir. 1953), enfg. 101 NLRB 239 (1952).

The situation here cannot be likened to the adverse inference, which is justified to destroy an asserted affirmative defense advanced by a respondent when it refuses to produce records said to prove its position. Compare *International Hod Carriers, etc., Local No. 41 (A. E. Anderson Construction Company)*, 129 NLRB 1447, 1454 (1961), enfd. 295 F.2d 657 (7th Cir.). Absence of this Respondent's records means there is a void, but the negative does not supply the positive. Wherever any of the Respondent's witnesses spoke about the employment status of anybody, or testified at all on matters that could conceivably have been clarified by its records, I do not believe a word they spoke. My decision here, albeit finding the complaint unsupported, rests entirely upon all of the testimony given by the General Counsel's witnesses.

The testimony by three employee witnesses who testified in support of the complaint covers 570 pages of transcript; the principal witness, Acker, alone spoke for 383 pages. I do not intend to repeat here everything they said. It is the general picture that counts.

It will be recalled that when the people are dancing during the night, one man plays a phonograph (called disc jockey), a man operates each of the two electric light control switchboards (called disc board operator and light board operator), and sometimes one or two men pull the ropes which control pictures and colorful board drops which are suspended over the heads of the dancers (called flymen). It is the people who do this work who are said to constitute the limited bargaining unit.

Repeatedly the witnesses spoke of a number of titles attached to these men, as significantly descriptive of the special kind of work they do when exercising their skill. And, of course, the heart of the limited unit contention is that these men work to help put on "the show." This means it is their night work, while the "actors"—1,000 cash customers—are there, that the limited bargaining unit can be understood and likened to a theatre. But to see the testimony in proper prospective, it must also be understood that people work in this place all day, in great numbers, performing a great number of additional chores also directly related to the running of this entire business, or show. Maintenance of electrical equipment—the place must be a general maze of wires, fixtures, bulbs, and switches—is a major burden on everybody all the time.

A number of the people who, when so scheduled, work in the four named categories, also work during the day. It is also contended that there existed one "job" during the day that must be joined with the four listed night jobs. That one is called the "preset man" on the record. And again, the use of a phrase is the oral testimony technique for separating one job from who knows how many other employees who do the same kind of work every afternoon, often for 5 or 6 hours straight. Had the General Counsel asked for everybody *except* the door ticket sellers, the security guards, the bartenders, and the busboys, it might be possible even on this record to just say they are out and all the rest are in. Instead, he spoke of specific job titles—which are clearly no more than descriptive adjectives used by the employee witnesses—to sell the idea that employees in the five listed categories are comparable to theatre personnel. In reality, the basis of selection seems to be certain specified work performed and the employees who did that work, all of them and only them, as constituting the limited bargaining unit. And the best I can make of all this is that that special work—called "stagehand" for conclusionary reasons—is: Playing a record on a phonograph, operating the two light switchboards near the phonograph, pulling the ropes which raise and lower the

"scenes" all over the same hall, and "presetting"—whatever that means. Apart from the fancy phrase, all this is adjusting the switchboards, checking defects in the electrical equipment in them, and changing light bulbs.

We start with the phonograph. Again and again the witnesses spoke of their theatrical experience, their other employment as "stagehands" in this or that known theatre, and even, some, of their professional status as teachers in the theatrical world. But all this man does here is put one record after another on the phonograph and play it. Others do it too, both guests and other employees, albeit there seems to have been no regularity in anything that went on during the night. Asked whether another rank-and-file employee named Robin also played the phonograph, Acker, the principal witness, answered she did not do so "as an employee." It is this sort of testimony that leaves everything up in the air. When is an employee not working? Much was made of the fact that with the very high decibel count in today's music, some employees wore headsets in order to talk to one another during the evening. It is argued that this wearing of headsets also serves to tie the five categories into a separate group. But again, there is frequent mention in the record of others also wearing headsets during the night. Asked did he not also wear a headset when doing work other than that of pulling the ropes, Acker's answer was: "Not on a professional basis." "Just to converse with someone at one of those stations."

The work of the "flyman," or "fly rail operator," is likened to theatrical people who change the scenery between the acts on Broadway. And then it was stated—one of the few clear and undisputed facts of record—that the hanging of the scenery, the initial positioning of all decorative postings and signs, is done by employees of an outside independent contractor, not the employer of the people involved in this case. All the flymen do here is raise and lower the ropes from the side as they are instructed to do during the night. Employee Craddock, after emphasizing that he had previously worked at the Lincoln Theatre Center, added that when he started pulling the ropes here, he had never done it before. There was no need for him to have done it before, and, except for the sound of the phrase, there is nothing connecting whatever he did at Lincoln Center with pulling these ropes.

Acker described himself as an electrician, and also as a carpenter. He is supposed to be included in the limited unit because he worked as a "flyman." But he worked as much during the day as he did at night when the dancing was going on. And his daytime duties—often 5 or 6 hours—were at maintenance work, as the electrician that he is. At times Acker tried to say he worked as a "preset" man, adjusting and repairing only those electrical fixtures tied intimately with the two electrical switchboards. But at times it was clear, from his own testimony, that he used to do just the usual maintenance work always necessary in a place of this kind, with electricity and lights without end.

> Q. Were those people ever transferred into a position as a waiter or busboy, let us say?
>
> A. No.
>
> Q. Were they ever transferred in to other positions other than the position they worked normally?
>
> A. Not unless there was an emergency. And if they had to help somebody out.

What did he do when putting in a full shift during the afternoon? "During the course of the day, if any lamps that were burned out, light bulbs. A number of dimmers that might've broken or anything that needs to be repaired. Or if there was a standard preset that had to be done to get discotheque in operation every evening. And this was just part of the normal procedure of just doing maintenance work on the equipment."

Acker had worked mostly during the daytime before the start of November, doing, as he said, general repairs. If I put this together with the fact that about the end of November, in a single week, he worked 5 full days for another company somewhere else, it means that because Acker happened to be assigned to do "fly rail" work during the few days when the union activities occurred, he must be viewed strictly as a "stagehand," and never mind the fact he was really a jack of all trades.

Craddock is said to be part of the limited unit because of the work he did as a "flyman" while the show was on at night. From his testimony:

> Q. Isn't it a fact that from time to time you would do various types of work like fixing electrical fixtures that might be located anywhere in Studio 54?
>
> A. Yes.
>
> Q. And that was while you were working the fly rail or the E-board operation, right?
>
> A. Yes . . . . It was either before the club opened or after or I came in another time or day.

The so-called preset man, whom the General Counsel would include in the limited unit, was Jess Herman. Acker worked with him, or in his place, at times. Again, asked whether "there were people that were doing that kind of work, replacing bulbs and fixing light fixtures" he said, "Not on the stage. Nothing to do with the theatrical performance." How does one reconcile this with the simultaneous claim that the whole place was "the stage" and all the people present on any given night "the actors"? What the witness was really trying to do was achieve his end object of separating the few—whom the Union would put into a separate bargaining unit—from others who did the same work. A final quote will be enough:

> Q. Weren't there other people who prepared the place for things that had to be done later?
>
> A. In other areas of the studio, yes.

Paton, who called himself a "flyman," and used to prepare the tentative schedules for who should work which days, said there were times when a busboy or a waiter used to operate the fly rail, and the two light switchboards.

Six signed union authorization cards were received in evidence—four by the four employees who were fired

(Acker, Scott, Herman, and LeBrun) and two by Paton and Craddock. It is argued by the General Counsel that at most there were only four other employees in the limited unit about November, when the Union is said to have mailed its demand letter to the Respondent.

This factual assertion that these 10 named, and only these 10, were employed by the Respondent to do the work of the "five categories" colorfully described by the employee witnesses, rests on nothing more than Paton's statement that it is so. He just called off those names. With one of them—Acker—having worked only 1 day that critical week in November and 5 days at another place where he was also employed, and with another—Scott—having done only 3 days during that week, and never before, one wonders: How many people were casuals, part-timers, or just "on call," etc.?

The General Counsel did place in evidence a two-page document from the Respondent's records. It was identified by Paton, who used to have something to do with giving out the paychecks, as a computer printout. It bears the date November 7. There is a list of names, with an identifying number—700—appearing next to many names. A great number of the listed names—in fact 37—are labeled in that classification. Asked what did the "700" stand for, Paton said: "The production people working on the stage, or working with the stage, associated with the stage." After the exhibit was received in evidence, Paton said "most" of the people named there were not working in November 1978. As he looked at the exhibit, and was asked about one name and another, his memory failed. He said there was one disc jockey in addition to those he named, but he could not remember that particular name. He spoke of some of the employees listed on the exhibit as having worked only 2 months previously, when the place was renovated. Why such names of employees who—if it be so—were not employees, should be on the November payroll no one offered to explain.

On cross-examination Paton was asked about J. Mack, whose name is on the exhibit, and said she used to do "electrical work on the stage." He explained away another "700" employee on the list—F. Mastroiani—as a man who "did some acting. Musical comedy." But there is no evidence at all throughout the entire record about "actors," or any "stage," except it be the whole place. With the "disc jockey" and the "disco board operator" likened to stagehands because they served to generate an overall ambience of theatrical entertainment, how do I leave this man Mastroiani out of the limited unit?

Paton said he knew nothing about three other listed names—K. Ross, J. Senter, and G. Turski. About still another named employee—William Schwarzback—the witness said only he worked the "fly rail for a time," but could not otherwise recall what he did. Could it be that many of the people listed on that printout worked during the period in question as did Craddock, one of the unioneers? Craddock testified that before October he worked only 2 days a week—"Whenever they needed me," and between October and the following February 1979 "I worked one night a week." If Craddock had status to be counted in as part of the unit in this refusal-to-bargain case, there must have been many others like him, and the document in evidence strongly indicates just that.

I am unable to find on the basis of this testimony and other evidence, just how many persons held employee status with this Company that 1 week in November 1978, or who they were by name. It will not do for the General Counsel to argue that because the owners refused to release their books (assuming—under the circumstances!!—that such records would be at all decipherable) Paton's off-the-cuff restatement of what is no more than the prosecution and complaint allegations, must be taken as gospel. In a sense, this element in a refusal-to-bargain case is like a Board representation proceeding—where the Board must have the objective facts sufficient to find majority status. Recalcitrance, deception, even misbehavior by a party, cannot supply the necessary missing link. I think it better, in a case of first impression, where the Board is asked to establish a principle of representation case law later to be applicable to a new and broadening employment area, that it have before it a more reliable picture of the business activity involved.

V. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

VI. THE REMEDY

The Respondent must be ordered to cease and desist from committing such repetitive offenses in violation of Section 8(a)(1) of the Act. It must also be ordered to reinstate the four discharged employees to their former employment and to make them whole for any loss of earnings they suffered in consequence of the discrimination against them. In light of the extent of the unfair labor practices committed, the Respondent must also be ordered to cease and desist from in any other manner violating the statute.

CONCLUSIONS OF LAW

1. By discharging Mitchell Acker, Richard Scott, Jess Herman, and Nicole LeBrun for engaging in union and concerted activities, the Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

2. By the foregoing conduct, by coercively interrogating employees concerning their union activities, by questioning employees concerning the union activities of fellow employees, by promising employees increased monetary benefits for work in return for abandonment of union activities, by promising increased work assignments to induce abandonment of the Union, by threatening to discharge employees in retaliation for their union activities, by threatening employees with physical, personal violence to stop the union activities, and by threatening to reduce the work hours assigned to employees in

retaliation for the union activities, the Respondent has engaged in and is engaging in violations of Section 8(a)(1) of the Act.

3. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[1]

The Respondent, Broadway Catering Corp. d/b/a Studio 54, New York City, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or in any other manner discriminating against its employees because of their union activities.

(b) Coercively interrogating employees concerning their union sentiments and activities.

(c) Questioning employees concerning the union activities of fellow employees.

(d) Promising increased monetary benefits to induce abandonment of union activities.

(e) Promising employees increased work assignments to induce abandonment of the Union.

(f) Threatening to discharge employees in retaliation for their union activities.

(g) Threatening employees with physical, personal violence to stop their union activities.

(h) Threatening to reduce the work hours assigned to employees in retaliation for their union activities.

(i) In any other manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist a labor organization, to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any or all such activities.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Mitchell Acker, Richard Scott, Jess Herman, and Nicole LeBrun immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges.

(b) Make whole the four named employees for any loss of pay or benefits they may have suffered by reason of Respondent's discrimination against them in the manner provided in *F. W. Woolworth Company*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977).[2]

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its place of business in New York City, New York, copies of the attached notice marked "Appendix."[3] Copies of said notice, on forms provided by the Regional Director for Region 2, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 2, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS HEREBY RECOMMENDED that the complaint be, and it hereby is, dismissed with respect to the 8(a)(5) allegations.

[1] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[2] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[3] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT discharge or in any other manner discriminate against our employees because of their union activities.

WE WILL NOT coercively interrogate our employees concerning their union activities or sentiments.

WE WILL NOT question our employees concerning the union activities of fellow employees.

WE WILL NOT promise increased monetary benefits to employees to induce them to abandon their union activities.

WE WILL NOT promise increased work assignments to induce abandonment of union sentiments.

WE WILL NOT threaten to discharge employees in retaliation for their union activities.

WE WILL NOT threaten employees with physical, personal violence to stop their union activities.

WE WILL NOT threaten to reduce the work hours assigned to employees in retaliation for their union activities.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of their rights to self-organization, to bargain collectively through Theatrical Protective Union Local No. 1, International Alliance of Theatrical Stage Employees, AFL–CIO, CLC, or any other labor organization, to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any or all such activities.

WE WILL offer Mitchell Acker, Richard Scott, Jess Herman, and Nicole LeBrun immediate and full reinstatement to their former positions or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges.

WE WILL make whole all four of those named employees for any loss of pay they may have suffered by reason of our discrimination against them, with interest.

BROADWAY CATERING CORP. D/B/A STUDIO 54